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No. 115

In the Supreme Court of the United States

OCTOBER TERM, 1930

W. P. BROWN & SONS LUMBER COMPANY,
PETITIONER

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

The memorandum opinion of the Board of Tax Appeals (R. 16, 18) is reported in 13 B. T. A. 1425, and the opinion of the United States Circuit Court of Appeals for the Sixth Circuit (R. 37, 50), sustaining the determination of the Board, is reported in 38 F. (2d) 425. Because of confusion between the footnotes and the opinion in the record, the opinion, without footnotes, is set out in the Appendix, *infra*, pp. 20–31.

JURISDICTION

The decree of the United States Circuit Court of Appeals for the Sixth Circuit was filed February 21, 1930. (R. 37.) Petition for writ of certiorari was filed May 14, 1930 (R. 52), and was granted with limitations on June 2, 1930 (R. 52), 281 U. S. 718.

The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The principal question presented is:

Whether written consents, executed by the taxpayer and the Commissioner of Internal Revenue, waiving the statutory period for the assessment and collection of taxes are valid, although given after the expiration of the statutory period.

STATUTES INVOLVED

The statutes involved are set out in the Appendix, *infra*, pp. 12–19.

STATEMENT

The order of this Court allowing the writ of certiorari in this cause limited the briefs and argument to "the question of the validity and effect of the waivers."

The findings of fact of the Circuit Court of Appeals for the Sixth Circuit included in the court's opinion (R. 37–43) are accepted by the petitioner. (Pet. 2.) The vital facts may be abridged as follows:

Petitioner filed its income and profits tax return for the year 1917 on April 1, 1918. (R. 37.) In December, 1920, an assessment waiver was filed which need not be considered. (R. 29.)

On March 5, 1923, the Commissioner made a jeopardy assessment of a deficiency in tax for the year 1917. (R. 37.) Thus this assessment was within the five-year statutory period for assessment. On March 27, 1923, the petitioner filed a claim in abatement. (R. 28, 37.) Collection was deferred and has not yet been made.

On April 1, 1923, the five-year statutory period for the collection of the 1917 taxes expired.

On December 10, 1923, the petitioner filed a waiver reading as follows (R. 31, 37):

> In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, W. P. Brown and Sons Lumber Company, of Louisville, Kentucky, and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of the said * * * for the years 1917 and 1918, under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved

August 5, 1909. This waiver is in effect for one year from the date it is signed by the taxpayer.

W. P. BROWN & SONS LUMBER CO. (S.),
By PRESTON P. JOYES, *Treas.* [SEAL.]
D. H. BLAIR (S.), *Commissioner.*
DEC. 15, 1923.

On October 25, 1924, the petitioner filed a further waiver, reading as follows (R. 33, 37):

In pursuance of the provision of existing Internal Revenue Laws, W. P. Brown & Sons Lumber Company, a taxpayer, of Louisville, Kentucky, and the Commissioner of Internal Revenue, hereby consent to extend the period prescribed by law for a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the years 1917, 1918, and 1919 under the Revenue Act of 1924, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909. This waiver is in effect for a period of one year after the expiration of the statutory period of limitation within which assessments of taxes may be made for the year or years mentioned, or the statutory period

of limitations as extended by Section 277 (b) of the Revenue Act of 1924, or by any waivers already on file with the Bureau.

W. P. BROWN & SONS LUMBER CO. (S.),
By J. G. BROWN, *Pres.* (S.)

This waiver was also signed by the Commissioner. (R. 17.)

The claim in abatement filed by the petitioner was allowed in part and rejected in part by the Commissioner of Internal Revenue, and the petitioner was advised of the action thus taken by letter dated October 28, 1925. (R. 6, 38.) The petitioner appealed to the Board of Tax Appeals from this determination on November 18, 1925. (R. 38.) The Board upheld the determination of the Commissioner. (R. 16.) The Circuit Court of Appeals for the Sixth Circuit affirmed the decision of the Board. (R. 37.)

SUMMARY OF ARGUMENT

Assessment of the petitioner's 1917 taxes would have been barred on April 1, 1923, had not the period for assessment been extended by the waivers. On March 5, 1923, the Commissioner made a jeopardy assessment. Thereupon the petitioner filed a claim in abatement. No part of the amount so assessed has been collected. On October 28, 1925, the claim in abatement was allowed in part and rejected in part by the Commissioner, and the peti-

tioner was notified of this action by letter of the Commissioner. On November 18, 1925, the petitioner appealed to the Board of Tax Appeals from this determination. Owing to the appellate proceedings the decision of the Board has not become final.

The respondent relies upon the waiver executed by the petitioner and the Commissioner on or about October 25, 1924. We contend that the fact that this waiver was given after the expiration of the statutory period for assessment and collection does not render it invalid. If valid, its effect is to extend the period for determination, assessment, and collection at least until December 10, 1925.

Because of the taking of the appeal to the Board and the other events which preceded it, statutes extend the time for collection until after the decision of this Court.

Furthermore, we contend that the waiver should be construed, because of its express terms, to permit assessment and collection within forty-two days after the final decision of the Board, at least. This position is predicated upon the provision in the waiver that it is "in effect for a period of one year after the expiration of the statutory period of limitation * * * as extended by Section 277(b) of the Revenue Act of 1924."

ARGUMENT

I

On the Construction of the Waivers Urged by the Petitioner, the Decision Below Must be Affirmed

A. The waivers operated to extend the period for determination, assessment, and collection at least until December 10, 1925

By the waiver of October 25, 1924 (pp. 4–5, *supra*), the parties consented "to extend the period prescribed by law for a determination, assessment, and collection." The instrument provided:

> This waiver is in effect for a period of one year after the expiration of the statutory period of limitation within which assessments of taxes may be made for the year or years mentioned, * * * or by any waivers already on file with the Bureau.

A waiver of December 10, 1923 (pp. 3–4, *supra*), consented to determination, assessment, and collection, and expressly provided that it was "in effect for one year from the date it is signed by the taxpayer." By virtue of these two waivers the statutory period was consequently extended to December 10, 1925.

The only question is whether these waivers were valid. The waiver of December 10, 1923, was given while the Revenue Act of 1921 was effective. Its validity is dependent upon the provisions of the same Act as the waiver involved in *Stange* v. *United States,* No. 23, present term. The ques-

tion of the validity of such a waiver is fully discussed on pages 6 to 14 in the revised brief filed by the Government in that case.

The second waiver was filed while the Revenue Act of 1924 was effective. The validity of such a waiver is fully discussed on pages 5–9 of the Government's brief in *Burnet* v. *Chicago Railway Equipment Company,* No. 231, present term.

B. STATUTES OPERATED TO EXTEND THE TIME OF ASSESSMENT AND COLLECTION UNTIL AFTER THE DECISION OF THIS COURT

A large part of the opinion of the court below was concerned with this question, which, in the view taken by that court, was not at all dependent upon the effect of the waivers. As the order of this Court limited the briefs and arguments to a discussion of the validity and effect of the waivers, we submit that the question of the effect of these statutes is not now open to review, and that petitioner is bound by the conclusions of the court below.

In any event, we submit that the court below was correct on this point. A consideration of this involves the study of numerous sections of the statutes. The opinion of the court below (R. 48–50; Appendix B, pp. 28–31, *infra*) indicates the route to be followed through the maze. We submit that its analysis of these statutes and its conclusion in regard to them are correct. In Appendix C, pp. 32–35, *infra,* we have outlined the argument in some detail.

II

THE REFERENCE IN THE WAIVER OF OCTOBER 25, 1925, TO SECTION 277 (B) OF THE REVENUE ACT OF 1924 OPERATES TO POSTPONE THE TIME FOR ASSESSMENT AND COLLECTION UNTIL AFTER THE DECISION OF THIS COURT IN THIS CASE

By the waiver of October 25, 1924, the taxpayer consented—

> to extend the period prescribed by law for determination, assessment, and collection * * *. This waiver is in effect for a period of one year after the expiration of the statutory period of limitation within which assessment of taxes may be made for the year or years mentioned, or *the statutory period of limitations as extended by Section 277 (b) of the Revenue Act of 1924,* or by any waivers already on file with the Bureau. (Italics ours.)

Section 277 (b) provided:

> The period within which an assessment is required to be made * * * shall be extended * * * if an appeal has been filed then by the number of days between the date of the mailing of such notice and the date of the final decision by the Board.

If this waiver was valid it extended the period for determination, assessment, and collection at least until December 10, 1925. (See p. 7, *supra.*) The Commissioner mailed the petitioner a deficiency letter on October 28, 1925, and on November 18, 1925, the petitioner filed an appeal with the

Board of Tax Appeals. Consequently at the time when the notice was mailed the Commissioner had about forty-two days left within which to make an assessment and collection, and under the terms of Section 277 (b) he would have forty-two days after the final decision of the Board within which to take these steps. The decision of the Board does not become final until after the date of the issuance of the mandate of this Court. Section 1005 of the Act of 1926, pp. 17–18, *infra*.

Assuming the validity of the waivers, this conclusion is inescapable, unless, as the petitioner contends, (1) the fact that Section 277 (b) applied merely to "the period within which assessment is required" prevents this provision of the waiver from having any effect upon the time for collection, or (2) unless the fact that Section 277 (b) was repealed by Section 1200 of the Revenue Act of 1926 operates to affect the language of the waiver.

We maintain that neither of these contentions is sound. The reference to "the statutory period of limitations as extended by Section 277 (b)" has, we submit, the same effect as if the provisions of that section as to time were copied into the waiver and the waiver should consequently be construed to read:

> This waiver is in effect for a period of one year after the expiration of the statutory period of limitations within which assessment of taxes may be made as extended by waivers already on file, and, if an appeal

> is taken, then also by the number of days between the date of the mailing of such notice and the date of the final decision of the Board.

The fact that Section 277 (b) refers only to the period within which *assessment* is required is immaterial. The waiver was for "determination, assessment, and collection," but the life of the waiver was measured by the statutory period for assessments.

The contention of the petitioner that its tax liability has ended because the Revenue Acts of 1924 and 1926 did not serve to extend the period of collection which had not expired at the time of their enactment, was disposed of by this Court in the case of *Florsheim Bros. Co.* v. *United States,* 280 U. S. 453.

CONCLUSION

It is respectfully submitted that the judgment of the court below is correct and should be affirmed.

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NOVEMBER, 1930.

APPENDIX A

STATUTES INVOLVED

Section 250 (d) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 265, provides in part:

> SEC. 250. * * * (d) The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess profits, or war profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act; * * *.

Section 277 (b) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 299, provides:

> (b) The period within which an assessment is required to be made by subdivision (a) of this section in respect of any deficiency shall be extended (1) by 60 days if a notice of such deficiency has been mailed to the taxpayer under subdivision (a) of section 274 and no appeal has been filed with the Board of Tax Appeals, or (2) if an appeal has been filed, then by the number of days between the date of the mailing of such notice and the date of the final decision by the Board. (U. S. C. Title 26, Sec. 1057.)

Section 278 (d) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 300, provides:

> (d) Where the assessment of the tax is made within the period prescribed in section 277 or in this section, such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made. (U. S. C. Title 26, Sec. 1061.)

Section 274 (a) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 55, provides:

> If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a peti-

> tion with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes, the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. (U. S. C. App. Title 26, Sec. 1048.)

Section 277 (b) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 58, provides:

> (b) The running of the statute of limitations provided in this section or in section 278 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision (a) of section 274) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court, and for 60 days thereafter. (U. S. C. App. Title 26, Sec. 1057.)

Sections 278 (d) and (e) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 59, provide:

> (d) Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior Act of Congress has

been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer. (U. S. C. App. Title 26, Sec. 1061.)

(e) This section shall not bar a distraint or proceeding in court begun before the enactment of the Revenue Act of 1924; nor shall it authorize the assessment of a tax or the collection thereof by distraint or by proceeding in Court (1) if at the time of the enactment of this Act such assessment, distraint or proceeding was barred by the statutory period of limitation properly applicable thereto, unless prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing thereto, or (2) contrary to the provisions of subdivision (a) of section 274 of this Act. (U. S. C. App. Title 26, Sec. 1062.)

Section 283 (e), (f), and (i) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 63, 64, 65, provide:

(e) If any deficiency in any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such Act as amended, was assessed before June 3, 1924, but was not paid in full before the date of the enactment of this Act, and if the Commissioner, after the enactment of this Act, finally determines the amount of the defi-

ciency, he is authorized to send by registered mail to the person liable for such tax notice of such deficiency, which notice shall, for the purposes of this Act, be considered a notice under subdivision (a) of section 274 of this Act. In the case of any such final determination the amount of the tax (whether deficiency or interest, penalty, or other addition to the tax) shall, except as provided in subdivision (h) of this section, be computed as if this Act had not been enacted, but the amount so computed shall be collected and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand, and the provisions relating to claims and suits for refund) as in the case of a deficiency in the tax imposed by this title, except as otherwise provided in section 277 of this Act and in subdivision (i) of this section.

(f) If any deficiency in any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or by any such Act as amended, was assessed before June 3, 1924, but was not paid in full before that date, and if the Commissioner after June 2, 1924, but before the enactment of this Act finally determined the amount of the deficiency, and if the person liable for such tax appealed before the enactment of this Act to the Board and the appeal is pending before the Board at the time of the enactment of this Act, the Board shall have jurisdiction of the appeal. In all such cases the powers, duties, rights, and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the Board and

of the courts, shall be determined, and the computation of the tax shall be made, in the same manner as provided in subdivision (e) of this section, except as provided in subdivision (j) of this section and except that the person liable for the tax shall not be subject to the provisions of subdivision (d) of section 284.

* * * * *

(i) In cases within the scope of subdivision (e), (f), or (g), if the Commissioner believes that the collection of the deficiency will be jeopardized by delay, he may, despite the provisions of subdivision (a) of section 274 of this Act, instruct the collector to proceed to enforce the payment of the unpaid portion of the deficiency, and notice and demand shall be made by the collector for the payment thereof. Within 10 days after such jeopardy notice and demand the person liable for the tax may obtain a stay of collection of the whole or any part of the amount included in the notice and demand by filing with the collector a bond in like manner, under the same conditions, and with the same effect, as in the case of a bond to stay the collection of a jeopardy assessment under section 279 of this Act. (U. S. C. App. Title 26, Sec. 1064.)

Section 1005 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 110, provides in part:

SEC. 1005. (a) The decision of the Board shall become final— * * * (4) Upon the expiration of 30 days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the decision of the Board be affirmed or the petition for review dismissed.

(b) If the Supreme Court directs that the decision of the Board be modified or reversed, the decision of the Board rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of 30 days from the time it was rendered, unless within such 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected to accord with the mandate, in which event the decision of the Board shall become final when so corrected. (U. S. C. App., Title 26, Sec. 1228.)

Sections 504 and 506 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 870, provide in part:

SEC. 504. SUSPENSION OF RUNNING OF STATUTE OF LIMITATIONS.

(a) Section 277 (b) of the Revenue Act of 1926 is amended to read as follows:

"(b) The running of the statute of limitations provided in this section or in section 278 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision (a) of section 274) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court (and in any event, if a proceeding in respect of the deficiency is placed on the docket of the Board, until the decision of the Board becomes final) and for 60 days thereafter."

(b) Subsection (a) of this section shall apply in all cases where the period of limitation has not expired prior to the enactment of this Act.

SEC. 506. WAIVERS AFTER EXPIRATION OF PERIOD OF LIMITATION.

(a) Section 278 (c) and (d) of the Revenue Act of 1926 are amended to read as follows:

* * * * *

"(d) Where the assessment of any income, excess-profits, or war-profits taxes imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer before the expiration of such six-year period. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon."

* * * * *

(c) The amendments made by this section to the Revenue Act of 1926 shall not be construed as in any manner affecting the validity of waivers made prior to the enactment of this Act, which shall be determined according to the law in existence at the time such waiver was filed.

Section 3224 of the Revised Statutes provides:

SEC. 3224. No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court. (U. S. C. Title 26, Sec. 154.)

APPENDIX B

No. 5376

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

OPINION

(Decided February 21, 1930)

W. P. BROWN & SONS LUMBER COMPANY AND Brown Brothers Land & Lumber Company

v.

COMMISSIONER OF INTERNAL REVENUE

PETITION TO REVIEW AN ORDER OF THE UNITED STATES BOARD OF TAX APPEALS REDETERMINING DEFICIENCIES IN TAXES FOR 1917 DUE FROM PETITIONERS

Before MOORMAN, MACK, and HICKS, Circuit Judges

MACK, Circuit Judge: * * *

On April 1, 1918, the other petitioner, W. P. Brown & Sons Lumber Company, filed its income and profits tax return for the year 1917; on December 13, 1920, it filed an unlimited waiver of "any and all statutory limitations as to the time within which assessments based upon such liability may be entered." On March 5, 1923, the Commissioner made a jeopardy deficiency assessment for the taxable year 1917 and in the same month petitioner filed a claim for the abatement thereof. Thereafter

petitioner filed a further waiver dated December 10, 1923, in which it consented "to a determination, assessment, and collection of the amount of income, excess profits, or war-profits taxes due under any return * * * for the year 1917 * * *." This waiver by its terms would have expired on December 10, 1924. On October 25, 1924, petitioner filed a similar waiver extending the period to "one year after the expiration of the statutory period of limitations within which assessment of taxes may be made for the year or years mentioned, or the statutory period of limitations as extended by Section 277 (b) of the Revenue Act of 1924, or by any waivers already on file with the Bureau."

On October 28, 1925, respondent notified petitioner of a partial allowance of the claim in abatement and of the definite determination of the amount of the deficiency. On November 18, 1925, petitioner filed an appeal with the Board of Tax Appeals from this determination of deficiency. Subsequently the amount of the deficiency assessment, if any was to be paid, was stipulated by the parties; and the appeal was thereafter confined solely to the question of whether or not its collection was barred by the statute of limitations. From the decision of the Board finding that the collection was not so barred, petitioner has brought this appeal. * * *

* * * * *

Petitioner contends: (1) That the waiver of December 13, 1920, can not be relied upon because in terms it extended solely the right to assess and not the right to collect; (2) that both the waivers of December 10, 1923, and October 25, 1924, are inappli-

cable because they relate only to taxes due "under any return" and the assessment sought to be collected was not a return by petitioner but an additional assessment made by the Commissioner in 1923; (3) that such waivers are also invalid because they were filed after the expiration of the statutory period for enforcing collection; (4) and, finally, that these waivers by their terms expired prior to the entry of the Board's order, and since, as petitioner maintains, Section 277 (b) of the Act of 1924 is inapplicable to the right of collection, and the statute had run prior to the enactment of the Act of 1926, collection is now barred.

Respondent contends: (1) that the waiver of December 10, 1923, although filed after the statute had run, is valid within Section 250 (d) of the Revenue Act of 1921; (2) that by virtue of this waiver and that of October 25, 1924, the period for determination, assessment, and collection of the petitioner's taxes for the year 1917 was extended to December 10, 1925; (3) that the extension of time granted by Section 277 (b) (2) and Section 278 (d) of the Revenue Act of 1924 is applicable; (4) and that since the Act of 1926 was passed while petitioner's appeal was pending, the period for collection was also thereby extended until the decision of the Board should have become final.

(1) It is conceded that unless the right of collection has been kept alive by waivers and by the provisions of the Revenue Acts of 1924 and 1926, the collection of the unabated stipulated portion of the additional assessment for 1917 is now barred under Section 250 (d) of the Revenue Act of 1921.

(2) We need not consider whether or not the unlimited waiver of December 13, 1920, included collection, because in our judgment the waiver of December 10, 1923, though given after the statute had run, was effective to revive the Government's right to assess and collect the taxes for 1917. Petitioner's argument that it was not, proceeds upon the double theory that Section 250 (d) of the Act of 1921 necessarily requires that the waiver be signed before the statute has run, and that if the specified period has elapsed, the right as well as the remedy is extinguished. We find nothing in the text or content of Section 250 (d) to require this construction. Statutes imposing limitations upon action by the United States are to be strictly construed in favor of the Government. *United States* v. *Whited & Wheless, Ltd.*, 246 U. S. 552; *du Pont de Nemours & Co.* v. *Davis*, 264 U. S. 456. It is true that the section requires that the Commissioner also sign the waiver (*Greylock Mills* v. *Commissioner*, 31 F. [2d] 655 [C. C. A. 2d]); and the Court of Appeals of the District of Columbia seems to be of the opinion that this precludes a waiver after the five years has run, on the theory that the Commissioner's consent would be but a futile gesture after his authority to collect the tax has ended. See *Joy Floral Co.* v. *Commissioner*, 29 F. (2d) 865.

The legislative purpose in requiring such consent is not apparent; if a contract is contemplated, it is difficult to see what consideration the Commissioner furnishes. See *Greylock Mills* v. *Commissioner*, 31 F. (2d) 655, 657. Another reason, however, may be suggested. Oral waivers would have

been subject to dispute and controversy as to form and meaning, and Congress made it clear that the taxpayer should not be bound except by a written waiver acceptable to the Commissioner. When a waiver is accepted, it is understood, if not impliedly agreed, that proceedings for the collection of the tax will be suspended until intensive and thorough consideration of the taxpayer's claimed exemptions, valuations, and the like will have been made. This would frequently result in a delay of the assessment and collection until after the statutory period had run, and as an incident of orderly administrative procedure it was essential that the Commissioner have full knowledge of the action taken and, therefore, that such a waiver be not accepted indiscriminately by a Collector or revenue agent. This may well account for the statutory requirement that to be effective, the waiver be signed by the Commissioner. The time of his signature, however, was not vital; as recently stated by the Court of Claims, after a thorough examination of the contention that a prior signature was necessary, "to hold that the statute requires the Commissioner to consent to the waiver before the expiration of the period of limitations is to engraft upon the statute something which certainly is not contained within its provisions nor, as we think, is there any reason to infer that such was the intent of Congress." *Stange* v. *United States,* Ct. Clms., November 4, 1929, United States Daily, November 8, 1929, pp. 2262–63. See also *Wells Bros. Co.* v. *Commissioner,* 16 B. T. A. 79; *Harris Co.* v. *Commissioner,* 16 B. T. A. 469.

The contention that the right as well as the remedy was barred and that consequently there was no

consideration for petitioner's waiver can not be accepted. This problem has recently arisen in connection with the asserted unconstitutionality of §§ 607 and 611 of the Revenue Act of 1928 (45 Stat. 874–75, 26 U. S. C. A. 2607, 2611) by which Congress in certain cases removed the bar of the statute after it had once fallen. It has been held in a number of cases that the bar imposed by Section 250 (d) of the Act of 1918 (40 Stat. 1083) and similar provisions in other acts goes merely to the remedy and not to the right, and that the legislature which imposed the bar may remove it. *Huntley* v. *Gile,* 32 F. (2d) 857 (C. C. A. 9th); *Wright & Taylor Co.* v. *Lucas,* W. D. Ky., decided July 26, 1929; *Regla Coal Co.* v. *Bowers,* S. D. N. Y., decided by the writer, November 13, 1929. In any event, the bar of the remedy, provided by the ordinary statute of limitations, may be effectively waived without consideration. See Williston, Contracts, §§ 160–84.

(3) Petitioner's contention that the waivers of 1923 and 1924 include taxes due only under its return needs little discussion. The argument is that the language "due under any return made by or on behalf of said taxpayer" in the waiver limits the consent to a later determination, assessment, and collection of only such taxes as may have been shown to be due by that return. Petitioner's return for 1917 is not in evidence, and for aught that appears in the record before us, the tax here involved might have been assessed on the basis of information contained in the return, and would therefore be a tax due under that return. But aside from this possibility, we are clearly of the

opinion that such a narrow construction of the waivers would not be warranted either by the instruments read as a whole or by the statute pursuant to which they were filed. The taxpayer is required to make a return so that the Commissioner may have the information necessary to a correct determination of its tax liability, and if such information be incomplete, the Commissioner must supply the deficiency from other sources. Clearly, it is the entire tax liability to which the inquiry is directed; it is to determine this that the Commissioner accepts the waiver and delays assessment and collection. This broad purpose, implicit in the whole arrangement, is not to be thus restricted by a narrow construction of the phrase "due under any return" in this waiver.

(4) The series of waivers purported to extend the period for the determination, assessment, and collection of the 1917 tax to December 10, 1925, or for the period provided in § 277 (b) of the Revenue Act of 1924. On October 28, 1925, the Commissioner sent his notice of final determination, and on November 18, 1925, petitioner appealed to the Board of Tax Appeals. Since no proceeding to collect these taxes was begun prior to December 10, 1925, the continuance of the right under this waiver depends upon the construction of § 277 (b) and related sections of the 1924 Act and/or § 283 (f) of the 1926 Act. Petitioner asserts that § 277 (b) of the 1924 Act relates only to the right of assessment and not to the right of collection; that because of its reference thereto in the waiver of October 25, 1924, that waiver is similarly limited.

Section 280 provides that if, after June 2, 1924, the Commissioner determines that an assessment of 1917 taxes, "whether as deficiency or as interest, penalty, or other addition to the tax," should be made, the other provisions of the Act of 1924 are applicable. Section 274 (a) provides for the appeal of such determination to the Board of Tax Appeals, and § 277 (b) extends the period during which such assessment may be made until after the final decision of the Board. Thereafter, § 278 (d) allows the Government six years in which to collect the assessment.

In *Russell* v. *United States,* 278 U. S. 181, it was held that the extension granted by § 278 was limited to cases in which the assessment in question had been made after June 2, 1924, the effective date of the 1924 Act. That was a case of a direct proceeding by the United States to collect taxes: it was not a case involving an appeal to the Board of Tax Appeals. The opinion says of the Act of 1924, that

> It made provision for taxes thereafter to accrue; also for those already due. It distinguished between existing assessments and those which were to follow. It established a Board of Tax Appeals and gave the right of appeal thereto whenever thereafter the Commissioner should propose to assess for deficiency. * * * To secure proper action by the Board might require considerable time, and this was provided for by extending the limitation to six years after assessment. But the taxpayer was afforded protection against improper action by the Commissioner through an appeal before any assessment could be actually imposed—a new and valuable right.

If, in the instant case, the definite and final assessment of this deficiency tax was prior to June 2, 1924, then the *Russell case* governs it.

The assessment of March, 1923, was a jeopardy assessment to which petitioner immediately filed a claim in abatement. The final determination of this assessment and its collection would await the Commissioner's action on the claim for abatement, under the common practice (See H. R. Rep. No. 2, 70th Cong., 1st Sess., p. 34; H. R. Doc. No. 578, 69th Cong. 2d Sess., p. 3 et seq., cited in *Regla Coal Co.* v. *Bowers, supra*); that such was petitioner's understanding is shown by its petition to the Board of Tax Appeals in which it states that the deficiency letter of October 28, 1925, "evidences the final determination by the Commissioner of the 1917 deficiency." Had it not been so, petitioner would have had no right of appeal to the Board under §280 of the Act of 1924; this requires a final determination, necessarily prior to final assessment. Cf. *United States* v. *Board of Tax Appeals*, 16 F. (2d) 337. The fact that the amount of the deficiency as finally determined was covered by the jeopardy assessment theretofore made, did not render it any the less a deficiency which the Commissioner on October 28, 1925, finally determined should be assessed. The Commissioner might have abated the former assessment in its entirety (as he did in part) and in the absence of a written settlement have determined a new deficiency assessment at any time before December 10, 1925. See *L. Loewy & Sons, Inc.*, v. *Commissioner*, 31 F. (2d) 652 (C. C. A. 2d); *Holmquist* v. *Blair*, 35 F. (2d) 10 (C. C. A. 8th). And such new determination would clearly

fall within § 280 and § 274 (a). Petitioner availed itself of the provisions of the Act of 1924 for a review of the determination of its tax liability; it can not now deny the applicability of related sections of that act. Accordingly, we conclude that since the deficiency determination of October 28, 1925, came within § 280, and was appealed under § 274 as being a determination before assessment, the extension of time granted by § 277 (b) and § 278 (d) has not expired.

(5) But assuming that the jeopardy assessment of March 5, 1923, was the only assessment, we are of the opinion that the period for collection was extended by § 283 (f) of the Act of 1926. That section specifically provides for a review by the Board of Tax Appeals, if an assessment was made "before June 3, 1924, but was not paid in full before that date, and if the Commissioner after June 2, 1924, but before the enactment of this Act finally determined the amount of the deficiency, and if the person liable for such tax appealed before the enactment of this Act to the Board and the appeal is pending before the Board at the time of the enactment of this Act, the Board shall have jurisdiction of the appeal." Moreover, in such case § 274 (a) provides (with exceptions not material to this discussion) that no distraint or proceeding for the collection of a deficiency shall be begun or prosecuted if a petition has been filed with the Board of Tax Appeals until the decision of the Board has become final. Furthermore, the beginning of such a proceeding or distraint during the time this prohibition is in force may be enjoined, contrary to the general rule. *Peerless Woolen*

Mills v. *Rose,* 28 F. (2d) 661. Section 277 (b) provides that the running of the statute of limitations against the beginning of a proceeding for collection, as well as against the making of assessments, "shall [after the mailing of the necessary notice] be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint, or a proceeding in court and for 60 days thereafter." See also Reg. 69, Art. 1232 and 1271.

Section 283 (1) provides that in the case of any tax imposed by a prior act, the running of the statute shall be considered to have been suspended (in addition to the period of suspension provided in § 277 [b]) for any period prior to the enactment of the Act of 1926 during which the Commissioner was prohibited from making an assessment or beginning distraint or proceeding in court.

In the case at bar the petition to the Board of Tax Appeals was filed on November 18, 1925, before the expiration of the last waiver on December 10, 1925, and thus was pending before the Board on February 26, 1926, the date on which the Act of 1926 became effective. Consequently, § 283 (f) and related sections of that Act are fully applicable.

Petitioner insists, however, that both § 277 (b) and § 283 (f) of the Act of 1926 are limited by § 278 (e) of that Act. The latter section provides that "This section * * * shall not authorize the assessment * * * or collection * * * (1) if at the time of the enactment of this Act [such proceeding] was barred * * * unless prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing thereto, or (2) contrary to the provisions of subdivision (a) of sec-

tion 274 of this Act." The argument is that since the last waiver by its terms expired on December 10, 1925, that is, prior to the effective date of the Act of 1926, this section bars collection. We can not accept this interpretation. The authority for extending the time for collection under the facts of the case at bar is found in § 283 (f), and not in § 278; the prohibition in § 278 (e), however, is by its language clearly limited to assessments and collections authorized by that section, that is, by the preceding alphabetical subdivisions of § 278. Moreover, the latter part of § 278 (e) recognizes and indeed reinforces the prohibition against collection while a case is pending before the Board, contained in § 274 (a). (This § 274 [a] is incorporated by reference in § 283 [f] which authorizes collection in the present case. Cf. § 283 (f) and § 283 [e].) Obviously, then, the provisions of § 278 (e) were not intended to be inconsistent with § 274 (a) or subdivisions (e) and (f) of § 283. If we are to accept petitioner's contention that § 278 (e) is inconsistent with the interpretation we have given § 283 (f), we must necessarily hold that § 278 (e) in effect nullifies the clear provisions of § 283 (f). Not only is there nothing in the statute to warrant this interpretation, but the interrelations of § 274 (e) and § 283 (f) makes the contrary clear.

APPENDIX C

DISCUSSION OF EFFECT OF STATUTES TO EXTEND THE TIME FOR ASSESSMENT AND COLLECTION AFTER DECEMBER 10, 1925

A jeopardy assessment was made on March 5, 1923. (R. 37.) Under the Revenue Act of 1921 then in force, all appeals by taxpayers were to the Commissioner. On March 27, 1923, the petitioner filed a claim for abatement of the jeopardy assessment. (R. 28, 37.) The claim in abatement was allowed in part and rejected in part by the Commissioner and the petitioner was notified of the deficiency in tax finally determined on October 28, 1925. (R. 6, 38.) The Revenue Act of 1924 (enacted June 2, 1924) provided for an appeal to the Board of Tax Appeals. The Board had jurisdiction to hear the appeal in the instant case only because after June 2, 1924, the Commissioner finally determined the deficiency in the tax. See *Appeal of Joseph Garneau Company*, 1 B. T. A. 75; *Roy & Titcomb, Inc.* v. *United States*, 39 F. (2d) 753 (C. Cls.), now pending in this Court on writ of certiorari, No. 412, present term.

As held by the court below, the applicable provisions of the Revenue Act of 1926 extend the time until after the decision by this Court. (R. 48–50; *supra*, Appendix B, pp. 29–31.) By the provisions of the Revenue Act of 1926, Section 283 (f), the jurisdiction of the Board of Tax Appeals in cases of this kind was expressly ratified. That section provided:

> If any deficiency in any * * * tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, * * * was assessed before June 3, 1924, but was not paid in full before that date, and if the Commissioner after June 2, 1924, but before the enactment of this Act finally determined the amount of the deficiency, and if the person liable for such tax appealed before the enactment of this Act to the Board and the appeal is pending before the Board at the time of the enactment of this Act, the Board shall have jurisdiction of the appeal. In all such cases the powers, duties, rights, and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the Board and of the courts, shall be determined, and the computation of the tax shall be made, in the same manner as provided in subdivision (e) of this section, * * *.

The facts of the instant case come precisely within the provisions of this section.

Section 283 (e) of the Revenue Act of 1926 provides that such a case shall be treated as though a notice had been sent "under subdivision (a) of Section 274 of this Act." The section further provides that in such a case—

> the amount of the tax * * * shall be collected and paid in the same manner and subject to the same provisions and limitations * * * as in the case of a deficiency in the tax imposed by this title, except as otherwise provided in section 277 of this Act and in subdivision (i) of this section.

The effect of this section is to give the same significance to the final determination by the Commissioner of the taxpayer's deficiency in the instant case on October 28, 1925, as though it had

occurred under the provisions of the Revenue Act of 1926.

Section 277 (b) of the Revenue Act of 1926 provides:

> (b) The running of the statute of limitations provided in this section, * * * shall * * * be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court, and for 60 days thereafter.

Section 274 (a) of the Revenue Act of 1926 provides:

> (a) If * * * the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed * * * the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. * * * no assessment * * * and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted * * * if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes, the making of such assessment or the beginning of such proceeding or distraint during the time *such prohibition* is in force may be enjoined by a proceeding in the proper court. (Italics ours.)

By Sections 277 (b) and 274 (a) of the Revenue Act of 1926 the period for collection is extended upon appeal to the Board of Tax Appeals until after its decision has become final. The Commis-

sioner is expressly prohibited from making collection until that time and any such attempt to enforce collection may be enjoined by appropriate proceedings.

The only manner in which the Commissioner could make collection is provided by Section 283 (i) of the Revenue Act of 1926, which authorizes him to instruct the Collector to collect the tax in any case where the Commissioner believes the collection of the deficiency would be jeopardized by delay. In such case, the Collector must mail to the taxpayer a notice and demand for payment of the tax and within ten days after such jeopardy notice the taxpayer may obtain a stay of collection by filing with the Collector a bond in like manner and under the same conditions as in the case of a bond to stay the collection of a jeopardy assessment.

The provisions of Section 283 (i) are not effective unless and until the Commissioner makes the further determination as to the necessity of a jeopardy collection and directs the notices be given. This further action by the Commissioner was not taken in the instant case. The possibility of a jeopardy collection is limited by the provisions of Section 283 (i). It in no way modifies the applicability of Section 277 (b) to the instant case. The prohibition of collection on the Commissioner in that section is "such prohibition" defined in Section 274 (a), as being the forbiddance of an assessment or collection pending an appeal to the Board of Tax Appeals. Thus, collection may be made after the decision of this Court, for by Section 1005 of the Revenue Act of 1926 the Board's decision will not become final until then.

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